05-1580

IN THE SUPREME COURT OF THE UNITED STATES

JON E. OZMINT, Director, South Carolina Department of Corrections, *Petitioner*,

v.

ROBERT LEE NANCE, *Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE SOUTH CAROLINA SUPREME COURT

RESPONDENT'S BRIEF IN OPPOSITION

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Capital Case

Questions Presented

I. Is there any compelling reason for this Court to grant the writ of certiorari, following this Court's remand for further consideration in light of *Florida v. Nixon*, 543 U.S. 175 (2004), where the petition primarily asserts only that the unanimous South Carolina Supreme Court correctly stated the *Cronic* standard again but then made erroneous factual findings and misapplied the standard?

II. Is there any compelling reason for this Court to review this case in light of the lower court's application of the *Cronic* standard and the fact that the result in this case would be the same even if the alternative *Strickland* standard urged by Petitioner was applied?

Table of Contents

Table of Authorities iii

Statement of the Case 1

Reasons Why the Petition Should Be Denied 7

I. No compelling reason exists for this Court to grant the writ of certiorari because this second petition primarily asserts only that the lower court made erroneous factual findings and misapplied this Court's holding in *Cronic*, even though the lower court correctly stated the *Cronic* standard 7

II. There is no compelling reason for this Court to review this case because application of the alternative *Strickland* standard, which Petitioner requests, would render the same result. 12

Conclusion 15

Table of Authorities

Federal Cases

Bell v. Cone, 535 U.S. 685 (2002) 7

Bell v. Quintero, 535 U.S. 1109 (2002) 9

Bush v. Gore, 531 U.S. 98 (2000) 11

Caldwell v. Mississippi, 472 U.S. 320 (1985) 6

Florida v. Nixon, 543 U.S. 175 (2004) 1, 7

French v. Jones, 332 F.3d 430 (6th Cir.), *cert. denied*, 540 U.S. 1018 (2003) 10

Hall v. Washington, 106 F.3d 742 (7th Cir. 1997) 13

Hernandez v. New York, 500 U.S. 352 (1991) 7

Mason v. Mitchell, 536 U.S. 901 (2002) 9

Mitchell v. Mason, 325 F.3d 732 (6th Cir. 2003), *cert. denied*, 543 U.S. 1080 (2005) 10

Plumlee v. Sue Del Papa, 426 F.3d 1095 (9th Cir. 2005) 8

Quintero v Bell, 368 F.3d 892 (6th Cir. 2004), *cert denied*, 544 U.S. 936 (2005) 10

Rompilla v. Beard, 125 S. Ct. 2456 (2005) 13

Ross v. Moffitt, 417 U.S. 600 (1974) 8

Simmons v. South Carolina, 512 U.S. 154 (1994) 6

Stutson v. United States, 516 U.S. 163 (1996) 11

United States v. Cronic, 466 U.S. 648 (1984) 7, 12

United States v. Morris, 377 F. Supp. 2d 630 (E.D. Mich. 2005); 8

Van Patten v. Deppisch, 434 F.3d 1038 (7th Cir. 2006) 8

Wiggins v. Smith, 539 U.S. 510 (2003) 13, 14

Williams v. Taylor, 529 U.S. 362 (2000) 12, 13

State Cases

Frett v. State, 378 S.E.2d 249 (S.C. 1988) 9, 11

McKnight v. State, 465 S.E.2d 352 (S.C. 1995) 9

Nance, 596 S.E.2d at 66 ..... 11, 12

Nance v. Ozmint, 626 S.E.2d 878 (S.C. 2006) 1, 5, 8, 12, 14

People v. Morris, 807 N.E.2d 377 *overruled on other grounds by People v. Pitman*, 813 N.E.2d 93 (Ill. 2004) 9

Respondent, Robert Lee Nance, respectfully requests that this Court deny the petition for writ of certiorari seeking review of the South Carolina Supreme Court's opinion in this case. The opinion is reported at *Nance v. Ozmint*, 626 S.E.2d 878 (S.C. 2006).

Statement of the Case

Robert Nance was arrested for murder and other offenses in the early morning hours of November 7, 1992. Appendix (App.) 407.[1] On December 10, 1992, lead counsel was appointed to represent him. App. 1847. In April 1993, after the state served notice of intent to seek the death penalty, co-counsel was appointed. App. 1847. Two months later, in June 1993, Robert Nance proceeded to trial. App. 8.

While Petitioner quotes the lower court's opinion with respect to the state's evidence of guilt, Petitioner fails to address the remainder of the significant facts found by the lower court.

TRIAL PRESENTATION

> [2] Following [Nance]'s arrest, defense counsel was appointed as [Nance]'s lead counsel. At the time he was appointed, defense counsel had either recently suffered from or was then suffering from pneumonia, gout, ulcers, diabetes, alcoholism, and congestive heart failure. During the trial he was taking various prescription medications, including Valium, Lopressor, Isocet, and Tenormin. At the PCR hearing, [Nance]'s experts testified that the side effects of those medications included impaired memory, lack of sleep, and sedation. Defense counsel's testimony at the PCR hearing indicated that he remembered very little from the trial that took place 5 years before the PCR hearing.[2]
>
> An attorney, who had only been practicing law for eighteen months, was appointed as co-counsel. Co-counsel testified at the PCR hearing that [Nance]'s mother was the only family member who was interviewed prior to trial; that he did

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[1]Appendix refers to the Appendix filed in the South Carolina Supreme Court in its review of the issues before this Court.

[2]There was also substantial evidence that counsel suffered from dementia associated with chronic alcohol consumption at the time of trial. *See, e.g.*, App. 2138-57, 3480, 3484, 3516.

not recall that anyone investigated [Nance]'s background; and that no one had requested [Nance]'s records from the Department of Corrections.[3]

The psychologist who planned to offer expert testimony concerning [Nance]'s mental health, Dr. Dewitt (Dewitt), asked defense counsel for [Nance]'s medical records, social history, statements from family members, and statements from the Department of Corrections staff but never received them.[4] He received [Nance]'s hospital records a few hours before trial.

GUILT PHASE

When introducing himself in his opening statement to the jury, co-counsel said, "I did not ask [to represent [Nance]], I was simply appointed. [defense counsel], as the public defender, did not ask for this case either. He was just appointed to represent Mr. Nance." In addition, defense counsel presented only three witnesses to testify on behalf of [Nance]'s defense: a corrections officer, an unqualified expert, and [Nance]'s sister.

Defense counsel's first witness, a Florence County detention center officer, testified that while in prison, [Nance] threw urine at a female corrections officer. On cross-examination, the officer testified that this episode was [Nance]'s only incident of misbehavior during the seven-month period that [Nance] was under his watch.

The defense's second witness, Dewitt, testified about [Nance]'s mental health. Based on only two meetings with [Nance], Dewitt opined that [Nance] more

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[3]Counsel also failed to gather school records, medical records, confinement records, police reports, witness statements, or family records. App. 1814-15, 1858.

[4]Even though counsel hoped to support an insanity defense, Dr. Dewitt also never received any information concerning the offenses. App. 598, 610-12, 2502.

closely resembled a criminal who was guilty but mentally ill.[5] Defense counsel was not successful in qualifying Dewitt as an expert.[6]

The defense rested after Dewitt's testimony. The trial judge then granted defense counsel's request to reopen his presentation so that [Nance]'s sister could testify. Defense counsel failed to prepare the sister's testimony but asked that she testify about [Nance]'s childhood.[7] The sister testified that [Nance] was an abnormal child: pretending to be an undertaker, he buried one of his brothers; pulled a gun on their father; stabbed himself with a broken bottle; and killed their pets.

In sum, the testimony that defense counsel presented in [Nance]'s guilt phase defense consisted of testimony of a corrections officer concerning the only incident of misconduct that [Nance] committed while incarcerated; an opinion by an uninformed psychiatrist who was not qualified as an expert; and unprepared testimony of [Nance]'s sister about [Nance]'s oddities as a child.

SENTENCING PHASE

Defense counsel's mitigation presentation during the sentencing phase of the trial lasted seven minutes. Counsel began by waiving the opening statement and then incorporated the meager amount of defense testimony elicited during the guilt phase.

Defense counsel then presented the testimony of a corrections officer of the Florence Detention Center, who testified that [Nance] was taking two prescription medications, Cogentin and Haldol, and that [Nance] had taken Haldol that morning.[8]

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[5]During the opening statements in the guilt-or-innocence phase, counsel told the jurors that they were going to present an insanity defense, App. 345, but then presented no evidence of insanity. Instead, the defense expert testified only that Nance was guilty but mentally ill. App. 610. Nonetheless, counsel argued again in closing argument that the only defense was insanity. App. 681. Finally, in closing arguments in sentencing, defense counsel told the jury that the defense was *not saying*–although they had throughout the trial–that Nance did not know right from wrong. *Compare* App. 345 *with* App. 777. Thus, in addition to failing to present any cohesive theory, counsel lost all credibility with the jury by contradicting themselves. App. 3532.

[6]In fact, counsel failed to even offer Dewitt as an expert. App. 659.

[7]Trial counsel only spoke to Nance's sister in the courtroom during a 15 minute recess just before her testimony. App. 613, 2433.

[8]While this witness was purportedly called to testify about adaptability to confinement, App. 824, counsel did not ask about that issue, App. 763. *See also* App. 1919 (admission of co-counsel

(continued...)

Counsel presented no further testimony, to which the trial judge responded by asking, "Are you ready to go to the jury?" Counsel responded, "We incorporate what we feel, Your Honor–the doctor and the other testimony by the sister would be repetitious." The judge then replied, "Do you need any time to collect your thoughts? This is rather quick." Co-counsel gave the closing argument, refusing to plead for [Nance]'s life and referring to [Nance] as a "sick" man who did "sick things."

We find that this trial presentation, in its entirety, represents a classic *Cronic* ineffectiveness case, falling under the second *Cronic* scenario because there was a total breakdown in the adversarial process during both the guilt phase and penalty phase of [Nance]'s trial. For the reasons set forth below, we presume [Nance] was prejudiced, and accordingly, grant him a new trial.

First, [Nance] was disadvantaged from the outset because lead defense counsel was in ill health and on heavy medication, and co-counsel had only practiced law for eighteen months.

Second, in aid of its claim that [Nance] was mentally ill, the defense had wanted [Nance] to appear in the courtroom in his natural demeanor, unaffected by the administration of psychotropic drugs. The defense was successful in getting the trial judge to order such. Nevertheless, defense counsel failed to inform the jail personnel of the trial judge's order that [Nance] be taken off the anti-psychotic drug, Haldol. Consequently, [Nance] remained in a drug-influenced demeanor during the entire trial, and the jury never observed his natural demeanor.

Third, the trial had just begun when co-counsel communicated to the jury that neither he nor defense counsel wanted to be there.

Fourth, while defense counsel may have been pursuing a defense of guilty but mentally ill (GBMI), he failed to qualify his own expert. Further, by eliciting the unprepared testimony of [Nance]'s sister only *after* defense psychologist Dewitt testified, defense counsel failed to give his unqualified expert, at minimum, the opportunity to inform the jury of how the sister's testimony of [Nance]'s mental irregularities as a child could lead to a conclusion that [Nance] was mentally ill at the time of the murder.

Fifth, defense counsel presented no adaptability evidence at the sentencing hearing. In fact, by merely incorporating the testimony elicited from the guilt phase, defense counsel gave the impression that [Nance] had not adapted to confinement,

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[#](...continued)
that this testimony made no sense).

because the only evidence that had been presented concerning his confinement was the urine-throwing incident.

During the PCR hearing, [Nance] presented testimony to show that the urine-throwing incident was the only instance of bad behavior during confinement. In fact, [Nance] was selected as the Manning Correctional Institution's inmate of the year and was nominated for the Department of Corrections' inmate of the year. He also sang in the prison choir and participated in other Christian activities. A jail administrator and prison minister testified that [Nance] was a model inmate. Defense counsel could have easily discovered this adaptability evidence prior to trial but failed to do so.

Sixth, defense counsel presented no mitigating social history evidence to explain [Nance]'s odd childhood behavior to which his sister referred to during the guilt phase. Defense counsel failed to reveal that [Nance] was beaten throughout his childhood; his father was an alcoholic who fought with many family members; he was treated with alcohol as a child in lieu of over-the-counter medication; and he grew up in a family of extreme poverty and physical deprivation.

Seventh, defense counsel's seven-minute mitigation presentation failed to provide the jury with *any* insight concerning [Nance]'s mental illness. At the PCR hearing, [Nance] introduced evidence that he has a family history of schizophrenia,[9] he has a history of hearing voices in his head, and he has suffered neurological damage.[10]

Finally, during the closing argument, co-counsel failed to plead for [Nance]'s life and referred to him as a "sick" man.[11]

Nance, 626 S.E.2d at 881-83 (quoting *Nance v. Frederick*, 596 S.E.2d 62, 65-66 (S.C. 2004), *vacated and remanded*, 543 U.S. 1043 (2005)) (court's internal footnotes omitted).

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[9] Nance's aunt, diagnosed with schizophrenia, was hospitalized at the State Hospital for 20 years. App. 2840-87; 3222-23.

[10] Nance has significant neurological damage, App. 2016, in the frontal and temporal lobes of the brain, App. 2017, 2019, 2094.

[11] Counsel waived opening argument in sentencing.

In addition to excluding these facts found by the South Carolina Supreme Court from the Statement of the Case, Petitioner also fails to address other significant facts presented in evidence and included in the record before the lower court for its consideration. For example:

- Due to counsel's failure to investigate, the jury was also unaware of Nance's intoxication at the time of the offenses. He and another man shared at least two pints of Canadian Club whiskey between them just hours before the offenses. App. 2481. Officers smelled alcohol on Nance at the time of arrest, App. 2381, and observed that Nance appeared to be in a dazed condition as if he were "high" on drugs or alcohol hours later, App. 2219, 2230.
- During sentencing, counsel stipulated to admission of a prior conviction that Nance does not have. App. 732, App. 2949-55. Nance was in confinement on the date of this alleged offense and could not have committed the crime. App. 2470, 2474.
- Although the issue of parole was raised during the trial and sentencing due to Nance's prior release on parole, counsel failed to request an instruction that Nance would be ineligible for parole if sentenced to life imprisonment. *See Simmons v. South Carolina*, 512 U.S. 154 (1994).
- Counsel failed to object when the trial court charged the jury more than 40 times in sentencing that it would only be making a "recommendation" on sentence. App. 730, 742, 779-90. The court never made it clear that the jury's recommendation would be followed. *See Caldwell v. Mississippi*, 472 U.S. 320 (1985).

Despite counsel's repeated failures and the minimal amount of evidence presented by the defense, the jury still deliberated for more than an hour and a half before sentencing Nance to death. App. 783 (8:15 p.m.), 787 (9:50 p.m.).

Reasons Why the Petition Should Be Denied

I. No compelling reason exists for this Court to grant the writ of certiorari because this second petition primarily asserts only that the lower court made erroneous factual findings and misapplied this Court's holding in *Cronic*, even though the lower court correctly stated the *Cronic* standard and the *Strickland* standard and further considered the issue following this Court's remand.

Under Rule 10 of this Court's Rules, certiorari will be granted "only for compelling reasons."

> A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

Rules of the Supreme Court of the United States (May 2, 2005). Throughout the petition, Petitioner complains primarily that the lower court misapplied this Court's holdings in *United States v. Cronic*, 466 U.S. 648 (1984), *Bell v. Cone*, 535 U.S. 685 (2002), and *Florida v. Nixon*, 543 U.S. 175 (2004), due to its findings of fact that Petitioner complains were based upon a "speculative showing." Indeed, Petitioner devotes substantial time to argument that the lower court's findings of fact were erroneous. Petition at 13-16.

This Court has repeatedly held that, absent exceptional circumstances, this Court will not reexamine the state court's findings of fact, but will instead "defer to the state-court's factual findings, even when those findings relate to a constitutional issue." *Hernandez v. New York*, 500 U.S. 352, 366 (1991). "Moreover, 'an issue does not lose its factual character merely because its resolution is dispositive of the ultimate constitutional question.'" *Id.* (quoting *Miller v. Fenton*, 474 U.S. 104, 113 (1985)).

Even assuming that the lower court's decision was erroneous, this Court's jurisdiction should not be invoked simply to correct errors in a lower court decision that is greatly fact-driven and very unique. *See* Rule 10 (Court will "rarely" grant review where lower court has arguably misapplied "a properly stated rule of law"). Indeed, "[t]his Court's review . . . is discretionary and depends on numerous factors other than the perceived correctness of the judgment we are asked to review." *Ross v. Moffitt*, 417 U.S. 600, 616-17 (1974).

In Petitioner's attempt to distinguish the clearly factual nature of its primary argument asserting simply that the lower court's ruling was erroneous, Petitioner argues that the state court failed to recognize, as other courts have, that *Cronic* is to be applied only in limited circumstances. Petition at 11. The state court clearly held, however, that *Cronic* is to be applied "infrequently," *Nance*, 626 S.E.2d at 880, and was applied here only because there was "a complete breakdown in the adversarial process," *Nance*, 626 S.E.2d at 878. Likewise, despite Petitioner's allegations that it "disregarded" and "ignored" this Court's prior order, Petition at 1, 6, the lower court held:

> In light of the recent holding in *Nixon*, we believe the present case represents one of the rare cases where counsel "entirely fails to subject the prosecution's case to meaningful adversarial testing."

Id. at 882 (emphasis in original). Indeed, the court concluded that trial counsel actually "helped to further bolster the prosecution's case against [Nance] rather than providing him with a defense." *Id.* at 883.

The only conclusion possible from these findings is that the South Carolina Supreme Court's findings are clearly in line with those of other courts applying *Cronic* only in limited circumstances.[12]

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[12]*See, e.g., Van Patten v. Deppisch*, 434 F.3d 1038 (7th Cir. 2006); *Plumlee v. Sue Del Papa*, 426 F.3d 1095 (9th Cir. 2005); *United States v. Morris*, 377 F. Supp. 2d 630 (E.D. Mich. 2005); (continued...)

In fact, in the twenty years since *Cronic* was decided, the lower court has only cited *Cronic* twice before this case and never since. *See McKnight v. State*, 465 S.E.2d 352, 353 (S.C. 1995) (prejudice presumed due to counsel's absence during the testimony of the victim, which was a critical stage of trial); *Frett v. State*, 378 S.E.2d 249, 250 (S.C. 1988) (rejecting *Cronic* presumption of prejudice based just on trial counsel's unpreparedness and sleeping during trial, but granting relief based on its holding that "counsel's ineffectiveness [was] so pervasive as to render a particularized prejudice inquiry unnecessary").

Petitioner asserts without citation, again implying some conflict in decisions, that "this Court has summarily vacated and remanded a number of decisions employing a presumption of prejudice analysis such as that relied upon by the state supreme court in this case." Petition at 16-17. Respondent's counsel have only been able to identify three cases remanded for further consideration in light of *Bell v. Cone*.[13] All three cases were from the Sixth Circuit. *Bell v. Quintero*, 535 U.S. 1109 (2002); *Jones v. French*, 535 U.S. 1109 (2002); *Mason v. Mitchell*, 536 U.S. 901 (2002).

In each of these cases, after further consideration, the Sixth Circuit still granted relief on the basis of a presumption of prejudice under *Cronic*. In *Bell v. Quintero*, the court distinguished *Bell v. Cone* on "the facts."

> Because the alleged deficient performance in *Cone* affected only specified parts of Cone's trial, prejudice could not be presumed. In the case at bar, on the other hand, counsel's acquiescence in allowing seven jurors who had convicted petitioner's co-conspirators to sit in judgment of his case surely amounted to an abandonment of

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[12](...continued)
People v. Morris, 807 N.E.2d 377, 407, *overruled on other grounds by People v. Pitman*, 813 N.E.2d 93 (Ill. 2004).

[13]This was the only case remanded for further consideration in light of *Nixon*.

> "meaningful adversarial testing" throughout the proceeding, making "the adversary process itself presumptively unreliable."

Quintero v Bell, 368 F.3d 892, 893 (6th Cir. 2004), *cert. denied*, 544 U.S. 936 (2005).

In *French v. Jones*, 332 F.3d 430, 439 (6th Cir.), *cert. denied*, 540 U.S. 1018 (2003), the court held that *Bell v. Cone* was inapplicable "to claims of denial of counsel during a critical stage." Reversal was required in *French* with a presumption of prejudice because the petitioner's counsel had been absent during supplemental jury instructions, which was a critical stage of trial.

In *Mitchell v. Mason*, 325 F.3d 732 (6th Cir. 2003), *cert. denied*, 543 U.S. 1080 (2005), the court again held that the defendant had been completely denied counsel prior to trial and prejudice was presumed. The court found that during the entire six months of counsel's representation, he met with the defendant no more than six minutes. It held that the pretrial period constitutes a critical stage of the proceedings because the pretrial period "encompasses counsel's constitutionally imposed duty to investigate the case." *Id.* at 743.

> The illogic of applying *Strickland* to these facts is manifest in that there are no conceivable tactical or strategic reasons for defense counsel to fail to consult with a client prior to trial. Such a meeting is vital if counsel is competently to develop a defense. If counsel does not meet with his client for more than two minutes at a time, the defendant is unable to confide truthfully in his lawyer, and counsel will not know, for example, which investigative leads to pursue, whether there are witnesses for the defense, or what kind of alibi the defendant may have.

Id. at 747.

In each of these cases, this Court declined further review, presumably because the lower court had appropriately analyzed the issue and, correct or not, its resolution did not warrant further review by this Court. Here, just as in those cases, the lower court has already cited the correct rules of law and conducted the appropriate analysis.

Petitioner also asserts that this Court should grant certiorari because the lower court's decision is "inconsistent even with the final position of Respondent's counsel below." Petition at 17. Regardless of Respondent's position below, the lower court was not bound by that position in making its determination that the *Cronic* analysis was the appropriate standard with respect to Petitioner's Sixth Amendment challenge. "The law is the law, whatever the parties . . . may have argued." *Stutson v. United States*, 516 U.S. 163, 184 (1996) (Scalia, J., dissenting).

Finally, the lower court's unanimous decision, which was written by the Chief Justice, is arguably based on an adequate and independent state ground. As this Court has recognized, "comity and respect for federalism compel us to defer to the decisions of state courts on issues of state law . . .[a practice that] reflects our understanding that the decisions of state courts are definitive pronouncements of the will of the States as sovereigns." *Bush v. Gore*, 531 U.S. 98, 112 (2000) (Rehnquist, C.J., concurring).

While the lower court cited *Cronic*, it also cited its own decision in *Frett v. State*, which rejected a *Cronic* presumption of prejudice and applied *Strickland*'s analysis. *Frett*, 378 S.E.2d at 250. The court concluded, however:

> While a defendant must ordinarily show that counsel's ineffective assistance resulted in actual prejudice, such a showing may be exempted where counsel's ineffectiveness is so pervasive as to render a particularized prejudice inquiry unnecessary.

Id. In this case, prior to the remand, the court recognized that

> at the time this case was tried, South Carolina common law provided little guidance as to what constituted an attorney's complete failure to provide effective representation. We hope that this opinion provides some clarity as to what does *not* constitute effective representation.

Nance, 596 S.E.2d at 66 n.5. Following the remand, the court continued to hold that this type of

> "consistently inept form of lawyer conduct [is not] acceptable in this state, nor will we employ a prejudice analysis, for '[defense] counsel's ineffectiveness [is] so pervasive as to render a particularized prejudice inquiry unnecessary.'" *Nance*, 358 S.C. at 490. 596 S.E.2d at 67 (citing *Frett v. State*, 298 S.C. 54, 56, 378 S.E.2d at 249, 251 (1988)).

Nance, 626 S.E.2d at 883.

Given all of these circumstances, this Court should deny certiorari. A ruling in this case is unlikely to affect any other case, given the unique factual scenario and the state court's apparent reliance on South Carolina common law.

II. There is no compelling reason for this Court to review this case because application of the alternative *Strickland* standard, which Petitioner requests, would render the same result.

Even if the lower court erred in applying a *Cronic* analysis, this Court should deny certiorari because the same result would clearly be reached under this Court's *Strickland* analysis. The *Strickland* standard is satisfied if a petitioner establishes both that his attorney's representation "fell below an objective standard of reasonableness," 466 U.S. at 688, and that the petitioner was "prejudiced" by his attorney's substandard performance, *id.* at 692.

In assessing whether counsels' conduct was reasonable under the *Strickland* standard, this Court must consider the extent of investigation conducted by counsel. "In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Id.* at 690-91. *See also Williams v. Taylor*, 529 U.S. 362, 396 (2000) (counsel's failure to discover and present voluminous mitigating evidence at sentencing could not be justified as a tactical decision to focus on the defendant's voluntary confessions because counsel had not "fulfill[ed] their obligation to conduct a thorough investigation of the defendant's background").

"Strickland does not require counsel to investigate every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant at sentencing." *Wiggins v. Smith*, 539 U.S. 510, 533 (2003). *See also Rompilla v. Beard*, 125 S. Ct. 2456, 2463 (2005) (there is no requirement that defense counsel "scour the globe on the off-chance something will turn up"); *Hall v. Washington*, 106 F.3d 742, 749-50 (7th Cir. 1997) (counsel need not have "a scorch-the-earth strategy"). Nonetheless, a decision not to investigate "must be directly assessed for reasonableness in all the circumstances," *Wiggins*, 539 U.S. at 533 (quoting *Strickland*, 466 U.S. at 691), and "an attorney must look into readily available sources of evidence," *Hall*, 106 F.3d at 749-50.

In assessing whether counsels' conduct was reasonable in both *Williams* and *Wiggins*, the Court held that when counsel fails to adequately investigate or to make a reasonable decision after investigation, counsel's performance is deficient because counsel cannot have a valid "strategy" not to pursue evidence that is unknown to counsel due to a failure to adequately investigate. *Williams*, 529 U.S. at 396 ("the failure to introduce the comparatively voluminous amount of evidence that did speak in Williams' favor was not justified by a tactical decision to focus on Williams' voluntary confession" because "trial counsel did not fulfill their obligation to conduct a thorough investigation of the defendant's background"); *Wiggins*, 539 U.S. at 527-28 ("counsel chose to abandon their investigation at an unreasonable juncture, making a fully informed decision with respect to sentencing strategy impossible").

The Court described the issue in *Wiggins* as "not whether counsel should have presented a mitigation case. Rather, we focus on whether the investigation supporting counsel's decision not to introduce mitigating evidence of Wiggins' background *was itself reasonable*." *Id.* at 523 (emphasis in original). In *Wiggins*, "counsel were not in a position to make a reasonable strategic

choice . . . because the investigation supporting their choice was unreasonable." *Id.* at 536. Counsel's conduct was deficient because the evidence revealed that the "failure to investigate thoroughly resulted from inattention, not reasoned strategic judgment." *Id.* at 526.

Here, as the lower court found, counsel conducted virtually no investigation, failed to prepare or even offer their expert witness as an expert during the trial. Counsel also deprived their own expert of the opportunity to explain how Nance's "mental irregularities as a child could lead to a conclusion that [Nance] was mentally ill at the time of the murder." *Nance*, 626 S.E.2d at 882. This evidence, particularly in light of counsel's failure to challenge the state's case, clearly reveals that Nance was prejudiced during the trial.

Likewise, prejudice in sentencing is clear where the defense presented no mitigation, even though Nance had significant social history mitigation, including an alcoholic, abusive father, and a childhood spent in "extreme poverty and physical deprivation." *Id.* at 883. Counsel also presented no insight into Nance's mental illness and no evidence of his neurological damage. *Id.* Counsel also failed to present evidence that Nance had been a model inmate, who adapted well to confinement. *Id.* Finally, counsel never even "plead[ed] for [Nance's] life." *Id.* Clearly, if all of the available evidence had been presented and counsel had appropriately advocated for Nance, there is a reasonable probability that the result of the proceeding would have been different. If Nance's "sentencing jury . . . . [h]ad . . . been able to place [his] excruciating life history on the mitigating side of the scale, there is a reasonable probability that *at least one juror* would have struck a difference balance." *Wiggins*, 539 U.S. at 537 (emphasis added).

Conclusion

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully Submitted,

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No. 05-1805

IN THE SUPREME COURT OF THE UNITED STATES

JON E. OZMINT, Director, South Carolina
Department of Corrections, Petitioner,

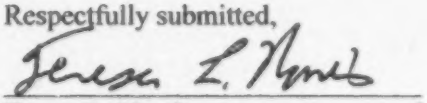
vs.

ROBERT LEE NANCE, Respondent.

CERTIFICATE OF SERVICE

I certify that a copy of the Motion for Leave to Proceed In Forma Pauperis and the Brief in Opposition to the Petition for Writ of Certiorari was served upon the attorney for Respondent. Service was made by U.S. mail, first class, postage prepaid, to Donald J. Zelenka, Esq., Assistant Deputy Attorney General of South Carolina, Office of the Attorney General, P.O. Box 11549, Columbia, South Carolina 29211.

Respectfully submitted,



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July 12, 2006.

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July 12, 2006

Honorable William K. Suter
Clerk, Supreme Court of the United States
One 1st Street, N.E.
Washington, DC 20543

Re: *Jon E. Ozmint v. Robert Lee Nance*, 05-1580

Dear Mr. Suter:

Enclosed please find for filing, with proof of service, the original and ten (10) copies of the Brief in Opposition to the Petition for Writ of Certiorari and Motion for Leave to Proceed In Forma Pauperis.

Please do not hesitate to contact me if you have any questions regarding this matter or if I can provide you with any additional information.

Sincerely,

Teresa L. Norris

Teresa L. Norris

Enc.

cc: Donald J. Zelenka
William N. Nettles

RECEIVED
JUL 13 2006